APPEAL NO. 042986
FILED JANUARY 10, 2005

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on November 3, 2004. The hearing officer resolved the disputed issues by deciding that the compensable injury includes meniscal tear and plical defect in the right knee, and hyperextension injury to the left leg but does not include chondromalacia of the right knee, hyperextension of the right leg, hyperextension injuries to both ankles, or systemic hypertension; that the appellant/cross-respondent's (claimant) date of maximum medical improvement (MMI) and impairment rating (IR) cannot be determined at this time; and that the claimant had disability for the disputed period, January 29 through July 1, 2003. The claimant appealed, disputing the extent-of-injury determinations that were unfavorable to him. The claimant also contends that the respondent/cross-appellant (carrier) appeared unrepresented alleging that (TS) is not a licensed attorney. The appeal file did not contain a response from the carrier to the claimant's appeal. However, the carrier also appealed. The carrier disputes the extent-of-injury determinations that were favorable to the claimant, the determination that MMI and IR cannot be determined, and the disability determination. The carrier further contends that the hearing officer was "unduly influenced, biased in conducting the [CCH] and the decision reflects impropriety, bias, and undue influence on his part." The claimant responded.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that on _____, the claimant sustained a compensable injury. The extent of the claimant's injury, disability, MMI and IR were in dispute. The claimant appealed the hearing officer's determination that the compensable injury did not include hypertension, hyperextension injuries to his bilateral ankles or right leg, nor chondromalacia. The carrier appealed the hearing officer's determination that the compensable injury included meniscal tear and plical defect in the right knee and hyperextension injury to the left leg.

The extent-of-injury issue presented a question of fact for the hearing officer to resolve. The hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given to the evidence. Section 410.165(a). It is for the hearing officer to resolve the inconsistencies and conflicts in the evidence and to decide what facts the evidence has established. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The hearing officer reviewed the record and medical evidence and decided what facts were established. An appeals-level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would

support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so against the weight and preponderance of the evidence as to be clearly wrong or manifestly unjust, and we do not find it to be so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). The hearing officer's extent-of-injury determinations are affirmed.

Disability is defined as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). The hearing officer found that the claimant had disability for the disputed period, January 29 through July 1, 2003.

The question of disability presented a question of fact for the hearing officer to resolve. The hearing officer, as the finder of fact is the sole judge of the weight and credibility of the evidence. Nothing in our review of the record reveals that the challenged disability determination is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra*. Accordingly, no sound basis exists for us to disturb that determination on appeal.

The carrier contends that the hearing officer was biased and that his decision reflects impropriety and undue influence. We do not agree. The carrier contends that the hearing officer cites a right knee MRI that was never introduced into evidence. In the Background Information section of the decision, the hearing officer notes that "the right leg MRI found no muscles tears that could have resulted from hyperextension." Carrier's Exhibit I is the report of a right thigh MRI dated September 23, 2003, which noted in part the following impression, "[t]here is no intramuscular hemorrhage or evidence of a muscle tear." We have reviewed the record and under the circumstances of this case, there was nothing in the record which demonstrated bias or improper conduct toward either party.

The carrier additionally contends that there were ex parte communications between the hearing officer and the claimant. To support his argument, the carrier points to the hearing officer's discussion at the CCH that certain documents were filed with him and the claimant asked the hearing officer not to exchange such documents with the carrier. Texas Workers' Compensation Commission (Commission) records indicate that the papers in question were submitted to the docket clerk by the claimant with a request that copies not be sent to the carrier. The hearing officer made the documents hearing officer exhibits at the CCH. The documents did not contain information pertinent to the disputes at issue in the CCH. The documents contend that only an attorney or adjuster can represent the insurance company and argues the "state bar card is not a license." The second document was entitled "Notice of Violation of Oath of Office" and contended that public officials whose actions and involvement in this case have caused intentional and irreparable injury to the claimant. We do not find that the evidence supports an allegation of ex parte communication.

We have affirmed the determination that the claimant's compensable injury includes meniscal tear and plical defect of the right knee. The hearing officer correctly noted that the designated doctor in response to a letter of clarification stated if the right knee was included in the compensable injury, a new examination would be required.

Section 410.251 requires a party to exhaust its administrative remedies and be aggrieved by a final decision of the Appeals Panel before it seeks judicial review. Although the evidence as presented precluded the hearing officer from being able to make a final determination regarding MMI and IR, Section 410.163(b) requires that a hearing officer shall ensure the preservation of the rights of the parties *and the full development of facts required for the determinations to be made*. [*Emphasis added.*] Until a determination is made regarding MMI and IR there can be no final decision from which judicial review may be sought. Albertson's, Inc. v. Ellis, 131 S.W.3d 245 (Tex. App.-Fort Worth 2004, pet. denied).

We affirm the hearing officer's extent-of-injury and disability determinations. We reverse the hearing officer's decision that the claimant's date of MMI and IR cannot be determined and we remand the case to the hearing officer for further consideration and development of the evidence consistent with this decision. On remand, the hearing officer shall: (1) ensure that the designated doctor is still qualified to act in such capacity; (2) seek clarification from the designated doctor, if the designated doctor is still qualified to act in that capacity for this matter; (3) provide all parties with the letter of clarification to the designated doctor and the designated doctor's response; (4) give the parties an opportunity to respond to the designated doctor's response; and (5) make a determination on the claimant's date of MMI and IR. In the event that the designated doctor is no longer qualified to act in that capacity, the record would need to be held open for the appointment of another designated doctor and for a determination on the claimant's date of MMI and IR.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays, Sundays, and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **LUMBERMENS MUTUAL CASUALTY COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Robert W. Potts
Appeals Judge